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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, *Petitioner*

v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR MELVIN ALLISON, ET AL., AS AMICI CURIAE

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BRIEF FOR MELVIN ALLISON, ET AL., AS AMICI CURIAE

STATEMENT OF INTEREST OF AMICI CURIAE

This brief of amici curiae is filed with the written consent of the petitioner and the respondents. The letters of consent have been filed with the Clerk of the Court.

Amici are the plaintiffs in *Allison* v. *United States,* 196 Ct. Cl. 263, 451 F.2d 1035 (1971). Their suit in the Court of Claims is based upon the racially discriminatory employment practices of the Grounds Maintenance and Landscaping Unit of the National Institutes of Health, Department of Health, Education and Welfare ("HEW"), where all of the amici were employed at the time the complaint was filed.

Amici filed their complaint in the Court of Claims after an extensive administrative proceeding in which it was found that racial discrimination existed in the promotion practices of the Grounds Maintenance and Landscaping Unit. Amici's claim for back pay was based upon Executive Order No. 11246, 30 Fed. Reg. 12319 (1965),[1] certain HEW regulations, the Back Pay Act, 5 U.S.C. § 5596 (1970), and the Constitution of the United States.

On cross-motions for summary judgment, the Court of Claims ruled that it had jurisdiction over amici's claim. The Court concluded that the Executive Order "provide[s] authority for awarding back pay," 196 Ct. Cl. at 265, 451 F.2d at 1036. This conclusion was based upon the Court of Claims' decision in another government employee racial discrimination case, *Chambers* v. *United States,* 196 Ct. Cl. 186, 451 F.2d 1045 (1971), which was decided the same day as *Allison.* The *Chambers* opinion contains an extensive review and analysis of the decisions of this Court and of the Court of Claims with respect to the jurisdiction of the Court of Claims.[2]

The Court of Claims has not to date awarded amici back pay, since it found in 1971 that the administrative record was inadequate for purposes of determining which of the amici would have been promoted in the absence of racial discrimination, and the amount

[1] Executive Order No. 11246 is now superseded in relevant part by Executive Order No. 11478, 34 Fed. Reg. 12985 (1969), as amended by Executive Order No. 11590, 36 Fed. Reg. 7831 (1971).

[2] The Court of Claims has since reaffirmed its decisions in *Allison* and *Chambers. See* Pettit v. United States, 488 F.2d 1026, 203 Ct. Cl. 207 (1973); Small v. United States, 470 F.2d 1020, 200 Ct. Cl. 11 (1972).

of back pay owed amici. 196 Ct. Cl. at 269, 451 F.2d at 1038. It therefore suspended proceedings

> "to allow plaintiffs to apply for administrative findings which shall show, person by person, whether such person would have been promoted, when, and to what grade or grades, in light of such person's qualifications, the qualifications of competitors, the existence of vacancies, the availability of funds, and all other factors that would have properly influenced the exercise of discretion in the making of an actual promotion at the time a promotion was due." 196 Ct. Cl. at 271, 451 F.2d at 1039.

The proceedings remained suspended until May 22, 1975.[3] Amici presently have a motion pending before the Court of Claims seeking an order directing HEW to (1) produce documents relevant to the issue of damages, (2) conduct a hearing concerning the amount of back pay owed amici, and (3) make necessary findings concerning the amount of back pay due each amicus. In response to amici's motion, HEW has asked for a dismissal or, in the alternative, a stay of proceedings based, in part, on the contention that this Court's decision in *Testan* v. *United States,* 499 F.2d 690, Ct. Cl. No. 128-72 (1974) with respect to the Court of Claims' jurisdiction would be dispositive of *Allison.*[4]

This Court's decision in the present case, however, would be dispositive of *Allison* only if the Court here

[3] Despite numerous requests by amici, administrative proceedings have still not been held at this late date. The period from the Court of Claims' Order in 1971 to date has been occupied almost entirely with settlement negotiations, which were initiated at the request of HEW.

[4] HEW raised the same argument in an earlier motion, but the trial judge of the Court of Claims disposed of the motion on grounds that made consideration of the argument unnecessary.

affirms the action of the Court of Claims since affirmance of *Allison* would be *a fortiori*. But if this case is decided in petitioner's favor, the decision here would not be dispositive of the issue of the jurisdiction of the Court of Claims in *Allison*. The claim for back pay in *Allison* is based upon Civil Rights Executive Orders, the Constitution, and the Back Pay Act, not the Classification Act of 1949. Further, the plaintiffs in *Allison* are black federal employees whose substantive right to be free from racial discrimination practiced by the government has been contravened. As such, constitutional issues and important federal policy issues, not applicable to or properly raised by this case, would bear upon any consideration of jurisdiction of the Court of Claims to award back pay in *Allison*. In fact, the government has conceded that the jurisdictional issue raised by *Allison* is "readily distinguishable" from the jurisdictional issue presently before this Court. Pet. Br. p. 22.[5]

It is the concern of amici that petitioner is making in this case far-reaching arguments which, if accepted, could severely impede the efforts of plaintiffs in *Allison* and other government employees to vindicate their legal rights, including their right to be free from racial discrimination. Plaintiffs in *Allison* and many other government employees would be severely handicapped in securing redress if the Court were to decide, as petitioner urges, that back pay for previous government employment can be awarded only where a federal statute expressly so provides, or that the sovereign immunity of the United States insulates the government from a suit for damages for wrongful employment practices. Amici show in the following that petitioner

[5] *See also* Petition for a Writ of Certiorari, p. 10 n.8, distinguishing the basis for jurisdiction in *Allison* from the instant case.

errs in these arguments and that respondents in this case have stated a valid cause of action within the jurisdiction of the Court of Claims. If the Court decides, however, that the Court of Claims erred in this case, amici urge that the decision be carefully confined to the particular statute on which the claim in this case is based. In particular, a decision of this Court bearing upon the authority of the Court of Claims to award back pay for contravention of Civil Rights Executive Orders or other statutes should be reserved for a case in which the issue is properly raised and the extensive constitutional, statutory, and policy issues are fully briefed and argued. Obviously this is not that case.

Nevertheless, because of its importance to a large number of government employees who could potentially lose the principal judicial forum available to them for the vindication of their employment rights, amici will address the jurisdictional issue raised by this case:

> Whether respondents' claims for back pay based upon an alleged misclassification of their Civil Service employment position states a cause of action for back pay over which the Court of Claims has jurisdiction under the Tucker Act.

Amici will not address the second issue raised by petitioner.[6]

SUMMARY OF ARGUMENT

The Court of Claims properly concluded that it had jurisdiction to entertain respondents' claim. That

[6] "Whether, in determining the correctness of respondents' classifications, the Classification Act requires that the positions held by respondents be compared with those of employees in another agency." Pet. Br. p. 2.

claim stated a valid cause of action under the Classification Act of 1949 which guarantees to all federal employees "equal pay for equal work." Where that mandate has been breached, as respondents allege, the Court of Claims has jurisdiction to compel the United States to compensate employees who have been financially aggrieved by that violation since: (1) the Court of Claims' power to award back pay for injuries resulting from government employment practices has been recognized in numerous cases, (2) that remedy is a generally accepted and important form of redress for unlawful employment practices, (3) determinations of the existence and amount of governmental liability under the Classification Act of 1949 are squarely within the competence of the Court of Claims, (4) Court of Claims jurisdiction over violations of the Classification Act of 1949 is necessary to assure an effective remedy for unlawful government employment practices, (5) ousting the Court of Claims of jurisdiction would be contrary to fair and sound federal employment practices and fosters no legitimate governmental employment or other interest.

The failure of the Classification Act of 1949 expressly to authorize suits in the Court of Claims for damages or to waive the sovereign immunity of the United States does not bar Court of Claims jurisdiction. Applicable authorities recognize a right to damages for unlawful employment practices not withstanding the failure of relevant statutes to particularize the kinds of remedies which will be available to enforce the statutory rights. It is equally settled that the Tucker Act constitutes a waiver of sovereign immunity for damages resulting from violations of federal statutory requirements, whether or not the applicable statute itself explicitly waives sovereign immunity.

ARGUMENT

RESPONDENTS' CLAIM FOR BACK PAY BASED UPON THE ALLEGED DENIAL OF THEIR RIGHTS UNDER THE CLASSIFICATION ACT STATED A CAUSE OF ACTION OVER WHICH THE COURT OF CLAIMS HAD JURISDICTION UNDER THE TUCKER ACT.

Respondents' suit in the Court of Claims was based upon an alleged misclassification of their employment positions in violation of the Classification Act of 1949.[7] For that, they sought back pay and reclassification of their positions from GS-13 to GS-14.

The basic issues in the present case, so far as Court of Claims jurisdiction[8] is concerned, are: (1) whether an alleged misclassification of respondents' employment positions creates a "claim against the United States founded . . . upon . . . any Act of Congress" within the meaning of the Tucker Act, 28 U.S.C. § 1491 (1970); and (2) whether the grant of jurisdiction in the Court of Claims over claims founded *inter alia* upon "any Act of Congress" constitutes a waiver of sovereign immunity with respect to such claims. If the answers are affirmative, respondents may properly maintain a suit in the Court of Claims to recover back pay for the period of the alleged wrongful Civil Service classifications of their employment positions.[9]

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[7] The Classification Act of 1949, 5 U.S.C. § 5101, *et seq.* (1970), repealed the Classification Act of 1923, Pub. L. No. 67-516, 42 Stat. 1488.

[8] The Court of Claims ruled that it did not have the authority to reclassify respondents' positions. Pet. App. p. 39. Respondents are not here contesting the propriety of that ruling.

[9] Respondents' ultimate success is dependent on proof that their positions were improperly classified. Resolution of that issue is in turn dependent in part on the resolution of the legal issue raised

In undertaking to defeat that right, petitioner advances an amalgam of undisputed general principles and conclusory assertions that find no support in the decisions of either this Court or the Court of Claims. The principal shortcoming in petitioner's argument is its repeated confusion of two quite distinct matters, *i.e.*, the substantive rights of government employees on the one hand and the sovereign immunity doctrine on the other. Thus, petitioner's principal point in support of its argument that the improper classification of respondents' employment positions does not give rise to a "claim founded . . . upon . . . any Act of Congress" is that the applicable statute, the Classification Act of 1949, "does not contain any express provision or provisions waiving the sovereign immunity of the United States to suits seeking back pay for the allegedly improper classification of federal civil service positions." Pet. Br. p. 4. Petitioner thus concludes that since "consent to suit by the United States must be express and unequivocal and may not be found by implication" (*id.* at 16) and since "the Tucker Act does not create any substantive right, enforceable against the United States" (*id.* at 12), the United States has not waived its sovereign immunity, and the Court of Claims therefore was without jurisdiction to entertain respondents' suit.

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by petitioner—whether on the facts of the present case the Classification Act of 1949 requires a comparison of the position held by respondents in the Defense Personnel Support Center of the Defense Supply Agency with similar positions in the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command. That issue does not bear upon the questions of whether the United States has waived sovereign immunity or whether a cause of action lies for violation of respondents' rights under the Classification Act.

It is the confusion of these two very different issues —whether there has been a waiver of sovereign immunity and whether a substantive right has been created—that led to petitioner's erroneous conclusion that the waiver and the source of the right must be embodied in a single Act of Congress.[10]

When these two issues are disentangled and analyzed separately, it becomes apparent that petitioner's conclusion is in direct conflict with the decision of this Court and of the Court of Claims. As demonstrated below, the Tucker Act itself constitutes a consent to suit on claims for money damages based upon Acts of Congress. See pp. 11-12, *infra*. Moreover, as also demonstrated below, an implied cause of action may exist for the violation of a statutorily created right even though the statute on which the right is based does not by its express terms so state. Indeed, in the context of government employment, the general rule is that an implied cause of action does exist wherever an employee's rights, whether created by the Constitution, Act of Congress, or executive regulation, have been violated. See pp. 15-21. *infra.*

Apart from the failings of its narrow and erroneous legal arguments, petitioner's brief is also seriously flawed by its failure to articulate any policy or other basis for denying respondents access to the only forum available where they can effectively redress their grie-

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[10] "The Court of Claims . . . held by implication that the Classification Act creates a substantive right to back pay for wrongful classifications. We submit that that holding was in error. There is no provision of the Classification Act expressly waiving the sovereign immunity of the United States to suits seeking back pay for the period of wrongful civil service classification and, under prevailing law, it is clear that such a waiver may not be found by implication." Pet. Br. p. 9.

vance.[11] It does not urge that the Court of Claims lacks competency to consider the misclassification claim raised by respondents;[12] it does not explain *why* a remedy for one form of employment discrimination—improper classification—should be denied while remedies for other forms of illegal employment practices are routinely afforded.[13] It fails to identify any respect

[11] Respondents may be able to obtain a reclassification of their position for the future through the suit they have filed in the United States District Court for the Eastern District of Pennsylvania. Testan and Zarrilli v. Hampton, C.A. No. 71-2250. See Pet. Br. p. 18 n.10.

This reclassification would not, of course, compensate respondents for the injury in the form of lost pay and benefits that they have already suffered as a result of the alleged wrongful classification. Nor could the District Court award respondents back pay if this Court determines that the Court of Claims does not have jurisdiction under the Tucker Act over this type of claim because jurisdiction in the District Courts under the Tucker Act is concurrent with that of the Court of Claims. 28 U.S.C. § 1346. In fact, district court jurisdiction is more limited since a district court may not entertain claims against the United States that are for an amount greater than $10,000. *Ibid.*

[12] Even if such argument had been made it would have to be rejected in view of the Court of Claims' plenitude of experience in dealing with issues far more intricate and complex than those raised by respondents' claim (*see* Glidden v. Zadanok, 307 U.S. 530, 536-37 (1962)), and the Court of Claims' authority under the Remand Statute ((28 U.S.C. § 1491) (Supp. III), Pub. L. 92-415, 86 Stat. 652 (1972)) to obtain the benefit of administrative expertise if it deems such assistance necessary.

[13] Amici refer in the following to many decisions of this Court and of the Court of Claims awarding back pay to government employees for various violations of employment rights arising under the Back Pay Act, the Equal Employment Opportunity Act of 1972, and many other federal statutes. Furthermore, back pay is routinely awarded in a variety of other contexts including cases of racial discrimination on the part of a private employer (*see, e.g.*, United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973)); for violations of the National Labor Relations Act

in which Court of Claims jurisdiction would be inimical to sound government employment policies, or any other governmental policy; it does not suggest any way that a decision favorable to respondents in this case would open the flood gates to unwarranted Court of Claims jurisdiction in other categories of cases.

In short, petitioner has clearly identified the limits on Court of Claims jurisdiction which it advocates; but petitioner has been unable to spell out any justification for the adoption of those limits.

A. The Tucker Act Constitutes a Waiver of Sovereign Immunity for Claims Against the Government Founded on Federal Statutes.

It is settled in decisions of this Court and lower courts that the Tucker Act constitutes a waiver of sovereign immunity, with respect to claims for damages founded upon *inter alia* Acts of Congress:

> "The sovereign immunity of the Government from suit was waived in the very acts of Congress establishing this court and conferring upon its jurisdiction to determine claims against the Government." *Kamen Soap Products Co., Inc.* v. *United States,* 124 Ct. Cl. 519, 526, 110 F. Supp. 430, 433 (1953).

See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); *United States* v. *King,* 395 U.S. 1, 3-4 (1969); *Glidden Co.* v. *Zadanok,* 370 U.S. 530, 557-

(*see, e.g.*, J. P. Stevens & Co. v. NLRB, 417 F.2d 533 (5th Cir. 1969)); for violations of the Railway Labor Act (*see, e.g.*, Dieringer v. Chicago, Milwaukee, St. Paul and Pacific R.R., 278 F. Supp. 211 (E.D. Wis. 1968)); and violations of the Universal Military Training & Service Act (*see, e.g.*, Hatton v. Tabard Press Corp., 406 F.2d 593 (2d Cir. 1969)).

58 (1962); *United States* v. *Sherwood,* 312 U.S. 584, 586-87 (1941); *United States* v. *Shaw,* 309 U.S. 495, 501 (1950); *Blaze* v. *Moon,* 315 F. Supp. 495, 497 (S.D. Tex. 1970), *aff'd,* 440 F.2d 1348 (5th Cir. 1971); C. Wright, *Law of Federal Courts* 70 (2d ed. 1970); Developments, *Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 975 (1970).

Indeed, in *United States* v. *Sherwood, supra,* this Court, after noting that "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit," which was quoted by petitioner in its brief (Pet. Br. p. 14), went on to state in the very next sentence that:

> "Jurisdiction to entertain suits against the United States to recover damages for breach of contract and certain other specified classes of claims was conferred on the Court of Claims by Act of February 24, 1855, 10 Stat. 612. With additions not now material, the jurisdiction was continued by paragraph First of the Tucker Act of March 3, 1887, 24 Stat. at L. 505, Chap. 359, which, as supplemented and reenacted, is now § 145 of the Judicial Code, 28 U.S.C.A. § 250." 312 U.S. at 587.

It is impossible to reconcile those authorities with any theory that the Tucker Act does not constitute a waiver of sovereign immunity with respect to the claim asserted by respondents.[14]

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[14] Petitioner's argument based on the absence of an express sovereign immunity waiver in the Classification Act of 1949 was prompted by confusion of the two separate issues of the substantive statutory rights of government employees and whether the government has waived sovereign immunity with respect to the claim asserted. The only statute pertinent here to the issue of waiver of the sovereign immunity of the United States is the Tucker Act. And, as demonstrated above, there can be no doubt that the Tucker Act is an express and unequivocal waiver of sovereign immunity with respect to "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . ." Whether the Classification Act of 1949 constitutes a waiver of sovereign immunity with respect to the claim asserted here is of no moment; the Tucker Act does constitute such a waiver. A requirement that the Classification Act of 1949 also contain an express waiver would, therefore, constitute an exercise in redundancy.

B. Respondents Have a Valid Cause of Action for Back Pay Under the Classification Act of 1949.

The question of whether federal civil service employees have a right to back pay for the period that their employment positions have been improperly classified has two components: (1) does the Classification Act of 1949 create a right in federal employees to have their positions properly classified; and (2) does a violation of that right give rise to a claim for damages? *See Eastport Steamship Corp.* v. *United States,* 178 Ct. Cl. 599, 605-07, 372 F.2d 1002, 1007-09 (1967).

1. The first question is disposed of by a brief review of the Classification Act of 1949 and its legislative history. The starting point is section 101 of the Act, as amended, which provides:

> "It is the purpose of this chapter to provide a plan for classification of positions whereby—
>
> (1) in determining the rate of basic pay which an employee will receive—
>
> (A) the principle of equal pay for substantially equal work *will be supplied*; and
>
> (B) variations in rates of basic pay paid to different employees *will be in proportion* to substantial difference in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions

of employees to efficiency and economy in the services . . . ." 5 U.S.C. § 5101 (1970) (emphasis supplied).

The mandatory language used in this purposes provision as well as section 302 of the Act and the elaborate statutory procedure created by the Act for effectuating these purposes, including the grant of enforcement authority to the Civil Service Commission, makes it clear that the congressional statement that "the principle of equal pay for substantially equal work will be followed" is a statement of mandatory federal policy and is not merely precatory.

The mandatory nature of the purposes set forth in section 101 of the Act is made clear by section 302, which requires that each position be classified in accordance with the duties and responsibilities of the position and the qualifications required for the position. 5 U.S.C. § 5106. This command is to be carried out through the joint efforts of the Civil Service Commission and the various agencies. The Civil Service Commission, "after consulting the agencies," is required to establish standards for the placement of positions "in their proper classes and grades." 5 U.S.C. § 5105. Section 502 of the Act requires that agencies place each position under their jurisdiction in the appropriate class and grade in accordance with the standards published by the Civil Service Commission. *Id.* at § 5107. Report of the House Committee on Post Office and Civil Service to accompany H.R. 5931, H.R. Rep. No. 1264, 81st Cong., 1st Sess. 9 (1949) ("*Report*");[15] Hearings on S.558, S.1762, S.1772, S.1790 Before the

[15] H.R. 5931 was ultimately enacted into law as the Classification Act of 1949.

Subcommittee of the Committee on Post Office and Civil Service, 81st Cong., 1st Sess. 40 ("*Hearings*").[16] Those classifications then become the basis for the agencies' "pay and personnel transactions." 5 U.S.C. § 5107.

The Act grants the Civil Service Commission broad enforcement authority, including the power to suspend an agency's authority to classify its own positions, if the Commission "finds that an agency is not placing positions in classes and grades in conformance with or consistently with published standards. . . ." 5 U.S.C. § 5111. The Commission also has authority to reclassify specific positions if it finds that they have been improperly classified by the agency. 5 U.S.C. §§ 5110, 5112. The exercise of this classification authority is not discretionary; if the Commission finds that a position has been improperly classified, it is required to reclassify it. *Ibid.* Moreover, the enforcement powers of the Commission may be brought into play at the request of an agency employee. *Report* at 9. And the classifications made by the agency are binding on the affected agency for all personnel functions, including pay. 5 U.S.C. §§ 5110, 5112; *Report* at 9, *Hearings* at 40.

This review of the Classification Act of 1949 makes it clear that the Act is not merely a hortatory catalogue of high principles. It places an obligation on the government, along with a correlative right in government employees, to classify employment positions in a manner so that government employees will receive the same pay for like work.

2. Whether respondents have a cause of action for back pay for the alleged violation of their rights under

[16] The cited passage refers to § 502 of S. 1762, which was identical in all relevant parts to H.R. 5931.

the Classification Act of 1949[17] is dependent on whether that Act "can fairly be interpreted as mandating compensation by the federal government for the damages sustained" by respondents. *Eastport Steamship Corp.* v. *United States, supra,* 178 Ct. Cl. at 607, 372 F.2d at 1009.[18]

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[17] The Court of Claims expressly declined to consider the applicability of the Back Pay Act since it determined that respondents had stated a cause of action based upon the Classification Act of 1949. The Back Pay Act authorizes "back pay for a government employee who has undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, . . . the employee would have otherwise received." 5 U.S.C. § 5596 (1970). Notwithstanding petitioner's assertion that wrongful classifications, as distinct from other forms of unlawful employment practices, do not fall within the scope of the Back Pay Act (Pet. Br. p. 16), it is submitted that a wrongful classification is an "unjustified or unwarranted personnel action" within the meaning of the Back Pay Act. The meaning of the phrase "unjustified or unwarranted personnel action" was intentionally left open by Congress. H.R. Rep. No. 32, 89th Cong., 1st Sess. (1966); S. Rep. No. 1062, 89th Cong., 2nd Sess. (1966). The regulations of the Civil Service Commission implementing the Act continue this approach. Thus, while various examples of the "unwarranted and unjustified personnel actions" are listed in 5 C.F.R. §§ 550.803(e) (1974), the regulation explicitly states that such examples are not exclusive and are not intended to provide a complete catalogue of unwarranted personnel actions. Further, in the ordinary usage of the words, there is unwarranted or unjustified actions when an agency's practices do not conform with applicable law or regulations. And, Congress has long recognized that failure or omissions to act constitute "action." *See, e.g.* 5 U.S.C. § 551 (1970). Finally, the decisions of the Court of Claims dealing with the Back Pay Act support the conclusion that a wrongful classification is an unwarranted and unjustified personnel action within the meaning of the Back Pay Act. *See, e.g., Ainsworth* v. *United States,* 185 Ct. Cl. 110, 118, 399 F.2d 176, 181 (1968), and the cases cited therein.

[18] The Court of Claims there held that the alleged violation of the Shipping Act of 1916, which was at issue in *Eastport,* did not give rise to a cause of action for damages. The plaintiff had alleged that the wrongful refusal of the Maritime Commission to give the permission required by the Shipping Act of 1916 before the sale of a ship to a foreign buyer could take place, had caused it monetary damage as a result of a lost sale, and it sought to recover an amount equal to the alleged damage. The Court of Claims' holding that the plaintiff did not have a cause of action under the Shipping Act of 1916 was based primarily upon the "regulatory" nature of the provision sued upon. The Court concluded that, in light of the regulatory nature of that provision and the historical reluctance of the courts and Congress to provide a remedy to private parties for injuries suffered as the result of "erroneous or wrongful regulation," the Shipping Act of 1916 could not be fairly interpreted to provide the plaintiff with a cause of action. *Id.* at 1008-11. This conclusion was also based on the broad implications of finding an implied cause of action for violation of the Shipping Act of 1916 since the court found that the regulatory function it created was indistinguishable from a broad range of other regulatory roles played by the government. None of these considerations exists in the present case. As the Court of Claims recognized in *Eastport,* the courts have long provided a forum for government employees who have suffered a wrongful personnel action. *Id.* at 1008.

The cause of action may be expressly created or it may be created by implication. Contrary to petitioner's suggestion that an express statutory declaration is a precondition to suit in the Court of Claims,[19] it has long been settled by decisions of this Court and the Court of Claims that claims for back pay may be asserted in the Court of Claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . ." based upon an implied cause of action. *United States* v. *Wickersham,*

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[19] "But no amount of analysis of [the Classification Act], viewed as a whole or section-by-section, can avoid the conclusion that Congress made no provision in the Classification Act for the award of back pay to persons found, whether administratively or by judicial decision, to have been erroneously classified." Pet. Br. p. 15. No decisions are cited by petitioner in support of this position. Nor does petitioner present any general principles or policy reasons to support its position.

201 U.S. 390 (1906); *accord, Simon* v. *United States,* 113 Ct. Cl. 182 (1949); *Greenway* v. *United States,* 163 Ct. Cl. 72 (1963); *Daub* v. *United States* 154 Ct. Cl. 434 (1961); *Betts* v. *United States,* 145 Ct. Cl. 530 (1959); *Ruffin* v. *United States,* 144 Ct. Cl. 689 (1959); *Newman* v. *United States,* 143 Ct. Cl. 784 (1958); *Watson* v. *United States,* 142 Ct. Cl. 749 (1958). *See also Keef* v. *United States,* 185 Ct. Cl. 454 (1968); *Starzck* v. *United States,* 145 Ct. Cl. 25 (1959); *cf. Burton* v. *United States,* 404 F.2d 365 (Ct. Cl. 1968), *cert. denied,* 394 U.S. 1002 (1969).

Were the rule otherwise, the jurisdiction of the Court of Claims, particularly with respect to claims founded upon violations of the Constitution, would be extremely circumscribed so as to insulate the United States from suits seeking vindication of a wide range of constitutional, statutory, and other substantive and procedural rights. Indeed, if an express provision of a cause of action were required, the inclusion in the Tucker Act of claims founded upon the Constitution would be hollow indeed, except perhaps for claims founded upon the Fifth Amendment prohibition on the taking of private property without just compensation, since the Constitution does not explicitly state that citizens have a cause of action for violations by the federal government of their constitutionally protected rights.

The leading decision in this area is *United States* v. *Wickersham, supra.* The plaintiff there was an employee who had been improperly suspended from a position within the Department of the Interior, which had been established by orders of the President and Secretary of the Interior pursuant to a civil service statute. No provision of the statute or of the executive

orders provided for compensation or back pay to employees unlawfully denied their positions or for a cause of action based upon an unlawful denial of their positions. On appeal by the United States, this Court affirmed the Court of Claims' ruling that the plaintiff was entitled to recover back pay, and stated in terms appropos to respondents' claims:

> "Whether [plaintiff] could have been summarily removed or suspended by the President or other competent authority is not the question now before the court, but the question is whether the employé during his wrongful suspension by a subordinate officer is entitled to the compensation provided by law. We see no reason in such an attitude of the case, where the wrongful suspension is clearly established, and the ability of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employé in the public service, protected by the statute and the orders of the President made in pursuance thereof, can be deprived of the benefit and emolument of his position by a wrongful and illegal suspension from his duties. We do not think such a contention can be sustained either by reason or authority." 201 U.S. at 399.

Similarly, respondents should not be denied the right to sue in the Court of Claims to recover the benefits of the GS-14 positions to which they claim entitlement. If the duties and responsibilities of respondents' positions are such that they are entitled by statute to have their positions classified as GS-14, neither policy considerations nor legal authority suggest that they should be denied back pay for the period of their incumbency while those positions were improperly classified.

The Court of Claims has regularly applied the *Wickersham* rule in a variety of cases where an express statutory authorization of an award of back pay has been absent. See the cases cited at page 18, *supra*. Illustrative is *Simon* v. *United States, supra*. There the government, while conceding that its treatment of the plaintiff violated applicable personnel regulations, asserted that the regulations did not expressly provide any cause of action for relief in the Court of Claims. Rejecting this argument, the Court of Claims held that the admitted violation of the regulations gave rise to a claim for money damages within its Tucker Act jurisdiction:

> "It is not necessary, to the jurisdiction of the court to render a money judgment upon rights conferred, that the statute, contract, or regulation upon which the claim is founded contain a provision that denial of a legal right thereunder shall give rise to a cause of action for compensation or damages. This matter is taken care of by the broad jurisdiction conferred by § 1491, U.S.C., Title 28, *supra*. *United States* v. *Wickersham,* 201 U.S. 390." *Id.* at 190-91.

The decisions in *Wickersham, Simon,* and their progeny are grounded on settled principles of broad application. This Court has repeatedly held, in a variety of contexts, that when federal rights are denied, the courts should employ all remedies necessary and appropriate to make the injured party whole. In *Bell* v. *Hood,* 327 U.S. 678, 684 (1946), for example, the Court concluded:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Accord, Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971); *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 239 (1968); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1969); *Mitchell* v. *Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 292 (1959); *Harmon* v. *Brucker,* 355 U.S. 579, 581-82 (1958); *Jackson* v. *United States,* 192 Ct. Cl. 765, 428 F.2d 844 (1970); *Butler* v. *United States,* 365 F.Supp. 1035 (D.C. Hawaii, 1973). *See also Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949); *United States* v. *Causby,* 328 U.S. 256 (1946); *Dooley* v. *United States,* 182 U.S. 222 (1901); and the cases cited in *Dooley* at pages 228-30.

These cases are founded on the commitment of our constitutional system to a "government of laws, and not men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). It is only the exceptional case in which a right will be found to exist without a remedy for a violation of that right.

C. Petitioner Has Not Established a Valid Basis for Excepting Respondents from the General Rule that the Courts Will Provide a Remedy When a Federally Protected Right Has Been Denied.

Petitioner has not suggested a reasonable basis for excepting the violation of respondents' rights from the general rule that a remedy will be provided and denying respondents' access to the one forum where they may seek redress for that violation.[20] It does

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[20] See p. 10 n. 11, *supra*.

contend that the "history of the legal relationship" between the federal government and its employees provides "conclusive evidence of Congress' intention not to permit the recovery of back pay for the period of a wrongful civil service classification" and that "[t]he prevailing rule for many years was that individual personnel actions were not subject to any judicial review." Pet. Br. p. 17.

Neither of these sweeping assertions is supported by the legislative history of the Classification Act of 1949 or the authorities petitioner relied upon. From its inception, this Court has held that the courts are the proper forum for claims of government employees that their protected rights have been violated by the government employer. As early as *Marbury* v. *Madison, supra,* this Court ruled that it had jurisdiction to hear the claim by a plaintiff that his right to a commission as a justice of peace for the District of Columbia had been denied by the Secretary of State who refused to deliver the commission.

Petitioner's *ipse dixit* is not supported by either of the early decisions of this Court to which it refers: *Keim* v. *United States,* 177 U.S. 290 (1900), and *United States* v. *McLean,* 95 U.S. 750 (1878). For example, when *McLean* was decided, the Court of Claims did not have the scope of statutory authority first provided in the Tucker Act. Until enactment of the Tucker Act in 1887 (24 Stat. 505), the Court of Claims' jurisdiction did not include a general grant of authority to award damages.[21] The Tucker Act greatly expanded the Court's jurisdiction and reflected Congress' increasing confidence that the Court could

[21] The Court's original jurisdiction was stated in the Act of February 24, 1855, 10 Stat. 612, Ch. 122.

effectively entertain a wide variety of claims that might be asserted against the government. *Glidden Co.* v. *Zadanok, supra,* 370 U.S. at 556-58. Moreover, not long after the Tucker Act was enacted, this Court held that the Court of Claims' broad jurisdictional grant gave it the inherent authority to award back pay where executive agents failed to act as required by law. *United States* v. *Wickersham, supra,* 201 U.S. at 397-99. In addition, the notion underlying *McLean* that executive action is unreviewable in court except in rare circumstances has been decisively rejected in subsequent developments in the law of judicial review. Today "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140-41 (1967); *accord, Barlow* v. *Collins,* 397 U.S. 159, 165-67 (1970); *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410-14 (1971). And the Court of Claims has found that the reasoning and policy considerations underlying these decisions are equally applicable in that court. *See, e.g., Moore-McCormack Lines, Inc.* v. *United States,* 188 Ct. Cl. 644, 654-66, 413 F.2d 568, 574-80 (1969).

The latter development has found clear expression in the area of government employment. This Court and the Court of Claims have not hesitated to insure that even discretionary governmental actions are exercised in accordance with limitations imposed by the Constitution, statute, or regulations. *See, e.g., Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Sampson* v. *Murray,* 415 U.S. 61 (1974); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957); *United States*

v. *Wickersham, supra; Chambers* v. *United States, supra; Allison* v. *United States, supra; Piccone* v. *United States,* 186 Ct. Cl. 752, 407 F.2d 866 (1969); *Glidden* v. *United States,* 185 Ct. Cl. 515 (1968); *Fletcher* v. *United States,* 183 Ct. Cl. 1, 392 F.2d 266 (1968); *Berkey* v. *United States,* 176 Ct. Cl. 1, 361 F.2d 983, (1966); *Shaw* v. *United States,* 174 Ct. Cl. 899, 357 F.2d 949 (1966); *Gregory* v. *United States,* 123 Ct. Cl. 794, 107 F. Supp. 840 (1952). Remedies have included the award of back pay for the violation of statutes or executive regulations. *United States* v. *Wickersham, supra; Chambers* v. *United States, supra; Allison* v. *United States, supra; Piccone* v. *United States, supra; Glidden* v. *United States, supra; Fletcher* v. *United States, supra; Berkey* v. *United States, supra; Shaw* v. *United States, supra; Gregory* v. *United States, supra.*

Similarly, *Keim* v. *United States, supra,* stands only for the limited proposition that when executive discretion is exercised in accordance with law, the exercise of discretion may not be disturbed. But the case does not hold, or even suggest, that when executive discretion has been limited, courts are powerless to insure that the limitation has been respected. Although there is dictum in *Keim* that courts do not have general supervisory power over appointments (177 U.S. at 293), this Court went on to consider whether the government complied with a statute limiting the executive's discretion in making appointments and held that "[t]here was no disregard of [the statute] either in letter or spirit." 177 U.S. at 294. Decisions of this Court following *Keim* confirm that it held no more than that the exercise of the executive's power of appointment may not be overturned by a court when

it is exercised in accordance with the law. *See, e.g., Eberlein* v. *United States,* 257 U.S. 82, 84 (1921).[22]

Petitioner further states that there is a "long-standing rule that a federal employee is entitled to receive only the salary of the position to which he was appointed, notwithstanding that he may have performed the duties of another position or the claim that he should have been placed in a higher grade." Pet. Br. p. 18. None of the authorities relied upon by petitioner so held. The central question in each such case has been whether the discretion of the executive, as an employer, to determine employee wage or grade levels is limited in any measure by statute or regulation, or whether the executive has unlimited discretion to make such determinations. In each case cited by petitioner, the Court of Claims (or a district court) inquired into the nature of the executive discretion as set forth in statutes or regulations, and concluded that the executive's discretion was either unqualified or that it had been exercised in accord with whatever limitations had been imposed.

None of these cases supports the proposition that the Court of Claims is powerless to act where the statutory right of government employees to have their positions properly classified has been denied. Nor could they properly do so in view of the myriad decisions cited

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[22] Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515-16 (1840), and United States v. Black, 128 U.S. 40, 50-52 (1888), referred to in the discussion in *Keim* of the scope of the power of appointment, stand only for the proposition that courts may not review the exercise of agency discretion in cases where the executive has been given unlimited authority to act or make judgments. These cases presented issues similar to those addressed by the Court of Claims in Amundson v. United States, 128 Ct. Cl. 80, 82 (1954), which is cited by petitioner. Pet. Br. p. 18.

above reviewing actions of the government employer to insure that they are in accord with limitations imposed by the Constitution, statute, or regulations. The cases cited by petitioner stand instead for the proposition that the courts may not disturb the exercise of governmental discretion where executive discretion is either unlimited or where it has been exercised in accordance with the prescribed limitations.

Petitioner has similarly failed to find anything in the legislative history of the Classification Act of 1949 remotely suggesting that Congress intended in that Act to create rights without remedies. This silence is fatal in light of the well-settled principle that remedies will be presumed when rights are created and the long history of awards of back pay to government employees based upon an implied cause of action. Acceptance of petitioner's argument would deny a judicial forum to persons who allege a violation of their right to equal pay for equal work. That result should be avoided in the absence of the clearest congressional intent. For, as noted by the Court of Claims in the present case: "When Congress desires to achieve this result [denying a remedy], it knows how to achieve it." 499 F.2d at 691.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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